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No. 93-6892

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief for the States of Ohio, Alabama, Alaska, Idaho, Indiana, Louisiana, Maryland, Montana, Nevada, Rhode Island, South Carolina, Utah and Vermont as Amici Curiae in Support of Respondent

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

ISSUE PRESENTED 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. PRIOR CONSISTENT STATEMENTS ARE PROPERLY ADMITTED AS PERMISSIBLE NONHEARSAY UNDER FEDERAL EVIDENCE RULE 801(d)(1)(B) WHENEVER THEY ARE OFFERED TO REBUT AN EXPRESS OR IMPLIED CHARGE AGAINST THE DECLARANT OF RECENT FABRICATION OR IMPROPER INFLUENCE OR MOTIVE 5

A. The Language of the Rule 5

B. The Principles of the Common Law 10

II. ANY OTHER CIRCUMSTANCES THAT MAY BE RAISED IN CONTESTING THE ADMISSIBILITY OF PRIOR CONSISTENT STATEMENTS WHICH ARE PROPERLY PROFFERED UNDER RULE 801(d)(1)(B) SHOULD BE JUDGED BY ASSESSING THEIR BEARING UPON RELEVANCY AND THE OTHER CONSIDERATIONS EXPRESSLY SET FORTH IN RULES 402 AND 403 15

III. THIS COURT HAS RECOGNIZED AND ACCOMMODATED THE SUBSTANTIAL PUBLIC INTEREST IN ENSURING THAT THE TESTIMONY OF CHILDREN WHO ARE VICTIMS OF CRIME CAN BE ADMITTED IN PROSECUTIONS OF THOSE WHO PERPETRATE SUCH CRIMES, AND THE SAME SUBSTANTIAL PUBLIC INTEREST SHOULD BE RECOGNIZED AND APPLIED IN THIS CASE 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES **Page**

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) 13

Bourjaily v. United States, 483 U.S. 171 (1987) . . . 10, 14, 15

Chambers v. State, 726 P.2d 1269 (Wyo. 1986) 2

Ginsberg v. New York, 390 U.S. 629 (1968) 19

Hanger v. United States, 398 F.2d 91 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969) 11

Malone v. United States, 94 F.2d 281 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938) 11

Maryland v. Craig, 497 U.S. 836 (1990) 19, 20

New York v. Ferber, 458 U.S. 747 (1982) 19, 20

Osborne v. Ohio, 495 U.S. 103 (1990) 19

People v. Hayes, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990), *cert. denied*, 112 S. Ct. 420 (1991) 2

People v. Koon, 724 P.2d 1367 (Colo. App. 1986) 2

State v. Arndt, 285 N.W.2d 478 (Minn. 1979) 2

State v. Gardner, 490 N.W.2d 838 (Iowa 1992) 2

State v. Robinson, 611 A.2d 852 (Vt. 1992) 20

CASES **Page**

State v. Younger, 453 N.W.2d 834 (S.D. 1990) 2

United States v. Corry, 183 F.2d 155 (2d Cir. 1950) 11

United States v. Gandy, 469 F.2d 1134 (5th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973) 11

United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983) 18

United States v. Harris, 761 F.2d 394 (7th Cir. 1985) 13, 15, 16, 17

United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984) 10, 13

United States v. Lawson, 872 F.2d 179 (6th Cir.), *cert. denied*, 493 U.S. 834 (1989) 18

United States v. Miller, 874 F.2d 1255 (9th Cir. 1989) 13, 15, 16, 17

United States v. Montague, 958 F.2d 1094 (D.C. Cir. 1992) 13

United States v. Owens, 484 U.S. 554 (1988) 6, 7, 8

United States v. Parry, 649 F.2d 292 (5th Cir. 1981) 13

United States v. Payne, 944 F.2d 1458 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1598 (1992) 6

United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988) 13

United States v. Quinto, 582 F.2d 224 (2d Cir. 1978) 10

STATUTES & RULES

Federal Rule of Evidence 104 15

Federal Rule of Evidence 402 . . . . . *passim*

Federal Rule of Evidence 403 . . . . . *passim*

Federal Rule of Evidence 801(d)(1)(B) . . . . . *passim*

Federal Rule of Evidence 801(d)(2)(E) 14, 15

Federal Rule of Evidence 1101 15

MISCELLANEOUS

Federal Rules of Evidence 801(d)(1)(B) Advisory Committee Notes 8, 11, 12

E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. Rev. 231, 239 11

H.R. Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7098 12

S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7051 . . . . . 12, 13

H.R. Rep. No. 650, 93d Cong., 1st Sess., *reprinted in* 1974 U.S.C.C.A.N. 7075 12

INTEREST OF THE AMICI CURIAE

The States that have joined this brief as amici curiae obtain numerous criminal convictions each year, and must defend those convictions on direct appeal, in state post-conviction proceedings, and often in federal habeas actions as well. In particular, the amici States prosecute an increasing number of child abuse cases, many of which involve some form of sexual abuse perpetrated upon a young child. Thus the specific issue raised in this case, which concerns the circumstances in which a child witness will be permitted to testify about this alleged abuse and to have his or her testimony buttressed and rehabilitated when it is impeached by the criminal defendant, is a recurring issue that often could prove decisive in reaching a verdict in such cases.

The interest of the amici States in the proper application of Rule 801(d)(1)(B) of the Federal Rules of Evidence is significant even outside the particular circumstances of this case involving the alleged sexual abuse of a child, for three reasons. First, the amici States often try civil cases in the federal courts, and the resolution of the existing disagreement about how properly to apply Rule 801(d)(1)(B) will have a direct effect on the trial of many such cases. Second, the amici States have an indirect but substantial interest in all criminal cases that are tried in the federal courts and that are based on alleged criminal activity which has occurred within their borders, as such cases squarely affect the public safety that each State seeks to protect. Third, most of the amici States have their own evidentiary rules analogous to Rule 801(d)(1)(B); and though the Court's decision in this case will not bind any state court in interpreting its own rule, it is likely that the decision in this case will have a great practical effect on the future interpretation and application of such rules.

In addition, the state courts, like the lower federal courts, are divided on the proper application of their own rules which are directly analogous to Federal Evidence Rule 801(d)(1)(B), even though the language of those state rules may be either exactly the

same or similar in all material respects to that contained in the federal rule.[1] Clear guidance from this Court that the language of Rule 801(d)(1)(B) is to be applied as it is written, and that any ancillary issues bearing on relevancy or other such considerations are to be assessed under other evidentiary rules that explicitly address such matters, is greatly to be desired and again is likely to have a salutary effect on state courts in arriving at the most persuasive interpretation and application of their analogous rules. That most persuasive view is the one adopted below in this case by the Court of Appeals for the Tenth Circuit.

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[1] *Compare, e.g., State v. Gardner*, 490 N.W.2d 838 (Iowa 1992) (trial court must determine whether "post-motive" statement is relevant and probative); *People v. Hayes*, 52 Cal. 3d 577, 802 P.2d 376, 276 Cal. Rptr. 874 (1990) (trial court should determine weight to be given to "post-motive" statement), *cert. denied*, 112 S. Ct. 420 (1991); *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986) ("post-motive" statements are admissible), *with State v. Younger*, 453 N.W.2d 834 (S.D. 1990) (applying "pre-motive" limitation to bar admissibility); *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986) (same); *State v. Arndt*, 285 N.W.2d 478 (Minn. 1979) (same).

ISSUE PRESENTED

Whether out-of-court statements of a child sexual abuse victim were properly admitted at trial pursuant to Rule 801(d)(1)(B) of the Federal Rules of Evidence.

SUMMARY OF ARGUMENT

This Court should interpret and apply Rule 801(d)(1)(B) in accordance with its plain language, which states that prior consistent statements are properly admitted as permissible nonhearsay whenever they are offered to rebut an express or implied charge of recent fabrication or improper influence or motive raised against the declarant. Some courts have created an additional requirement, which they have improperly read into the rule, that the prior consistent statements must have been made before any supposed motive to lie is alleged to have arisen. Any such extratextual requirement would undermine the utility and purpose of the Rule and should not be embraced by this Court.

Petitioner contends that the extratextual limitation he urges upon this Court is consistent with the approach that was developed at the common law. This contention, however, is either irrelevant or wrong, for three reasons. First, it abstracts from the considerable disagreement that existed among the common-law courts on this issue. Second, it seeks to gloss over the dramatic changes that occurred in this doctrine when the Federal Rules of Evidence were adopted. Third, it fails to come to grips with this Court's clear direction that where the text of a Federal Rule of Evidence appears to differ from the common law, the federal courts are to apply the text of the Rule as it was written and adopted rather than distorting the text and ignoring the superseding effect of the new Federal Rules.

The proper approach instead is that if prior consistent statements are properly proffered under Rule 801(d)(1)(B), then any other circumstances that may be pertinent in determining the

admissibility of such statements should be judged in accordance with the general provisions of the Federal Rules of Evidence that were formulated for making such determinations. In particular, any factors that are claimed to bear upon the probative value of the prior consistent statements, such as the nature of the alleged motive to fabricate, the strength of any such alleged motive, its origin and duration, and any countervailing motives or circumstances, should be assessed by weighing the relevancy of such statements in light of the other considerations expressly set forth in Rules 402 and 403.

In addition, this case resulted in a conviction for aggravated sexual abuse of a child. In several prior rulings, this Court has recognized and accommodated the substantial public interest in ensuring that the testimony of children who are victims of crime can be admitted in prosecutions of those who perpetrate such crimes. The same substantial public interest should be recognized and applied in this case as well. The Court therefore should offer guidance in this case to the lower courts, indicating that the necessity of protecting and encouraging child victims to testify against their attackers is a relevant factor that should be given substantial weight in making the case-by-case judgments that are necessary to determine the admissibility of prior consistent statements under Federal Rules of Evidence 801(d)(1)(B), 402, and 403.

ARGUMENT

I. PRIOR CONSISTENT STATEMENTS ARE PROPERLY ADMITTED AS PERMISSIBLE NONHEARSAY UNDER FEDERAL EVIDENCE RULE 801(d)(1)(B) WHENEVER THEY ARE OFFERED TO REBUT AN EXPRESS OR IMPLIED CHARGE AGAINST THE DECLARANT OF RECENT FABRICATION OR IMPROPER INFLUENCE OR MOTIVE.

Pursuant to the specific terms of Federal Rule of Evidence 801(d)(1)(B), a declarant's out-of-court statement is not to be excluded as hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." In this case, the defendant sought to impeach the testimony presented by A.T., the child declarant, by suggesting that she had a motive to lie because she would prefer to be living with her mother rather than with her father. Under these circumstances, the Tenth Circuit properly applied Rule 801(d)(1)(B) by admitting several prior statements made by the girl that were consistent with her testimony in court, all of which were offered to rebut the implied charge that she was lying on the stand.

A. The Language of the Rule.

By its terms, Rule 801(d)(1)(B) imposes specific conditions that must be met before a prior consistent statement becomes admissible at trial. The requirements set out in the Rule are:

> 1) the declarant must testify at trial and must be subject to cross examination concerning the statement; and 2) the statement must be consistent with the declarant's testimony and must be offered to rebut an "express or implied charge of recent fabrication or improper influence or motive."

United States v. Payne, 944 F.2d 1458, 1470 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1598 (1992). These are the only requirements found within the Rule itself that govern the admissibility of such statements.

In this prosecution for aggravated sexual abuse of a child, the declarant A.T. testified at trial and was subject to cross-examination. Indeed, the Court of Appeals properly rejected the suggestion made by the defense that she was not "subject to cross-examination" because she was unresponsive to certain questions. Instead, the Court of Appeals cited this Court's holding in *United States v. Owens*, 484 U.S. 554, 561 (1988), that the more natural reading of this requirement would find it to be satisfied when the witness is physically present, takes the stand, and testifies under oath, even if the witness is forgetful in some respects or is unable to answer all the questions put to him. Pet. App. 9-14.

In addition, both the District Court and the Court of Appeals properly found that A.T.'s prior statements were consistent with her testimony and were offered to rebut the defense's implied charge that she had an improper motive to lie because she wanted to live with her mother rather than with her father. The defense had aggressively raised this issue during its questioning of A.T. on cross-examination, and thus opened the door to an attempt by the prosecution to rehabilitate its chief witness to the events at issue here, *viz.*, the child who was abused by the defendant. The prosecution's use of prior consistent statements was thus entirely appropriate as contemplated under Rule 801(d)(1)(B).

In reaching this conclusion, the Court of Appeals also quite properly rejected the defense's contention that a "pre-motive"

restriction should be read into the Rule. It gave two reasons for rejecting any such restriction. First, "the text of the rule is silent on this point." Pet. App. 15. Second, the argument that is most frequently made for such a restriction turns on an assessment of whether such statements are likely to be relevant to the matters at issue in the case. Under the Federal Rules of Evidence, however, this determination is one that should be made in accordance with Rules 402 and 403, taking into account a variety of possible factors that may differ from case to case. Pet. App. 16-19.

The Court of Appeals thus set forth a proper application of Rule 801(d)(1)(B). As noted previously, the "pre-motive" restriction urged by Petitioner simply does not comport with the language of the Rule. Although the drafters could easily have written such a restriction into the Rule, they chose not to do so. Instead, they stated only that prior consistent statements must be "offered to rebut" a charge of "recent fabrication or improper influence or motive." Fed. R. Evid. 801(d)(1)(B).

Petitioner offers two arguments from the text of the Rule to support his position, both of which are unavailing. Initially, he contends that such statements must be offered to rebut a charge of improper motive, but they cannot succeed in rebutting any such charge if they are merely duplicative of the declarant's testimony and may be premised on the very same improper motive. Pet'r Br. 17-21. This contention is flawed for three reasons. First, it rests upon a strained interpretation of the phrase "offered to rebut." There is no question, for example, that in this case A.T.'s prior consistent statements were "offered to rebut" the implied charge of improper motive, and it was for the trier of fact to determine whether they succeeded in doing so. Petitioner errs by offering an unnaturally demanding reading of the term "rebut," claiming that unless the declarant's prior statements conclusively rebut the charge made, they are not even being "offered to rebut" it. This argument is perhaps best answered by analogy to *Owens, supra*. Just as the "more natural" understanding of the phrase "subject to cross-examination" was simply that the witness was

available to be cross-examined, although he may have been unable to give perfect or complete answers to every question put, *see* 484 U.S. at 561, even so the declarant's prior statements are "offered to rebut" the implied charge here of improper motive even though they may not decisively refute that charge such that a trier of fact could not conceivably find to the contrary.

A second response to Petitioner's initial argument is that it simply represents a thin attempt to disguise and avoid the ultimate determination of relevancy by disqualifying such statements as an initial matter. In essence, Petitioner claims that because a charge of improper motive has been raised to explain away such statements, they cannot even properly be considered relevant to the case and thus should be excluded in every possible instance. Not only does this claim beg the question of credibility that must ultimately be determined by the finder of fact, but it also would suggest, for the same reason, that such an attack on the credibility of the witness should render even the same statements made while the witness is on the stand just as irrelevant. Any such suggestion, however, would plainly be absurd.

Third, Petitioner's whimsical reading of the phrase "offered to rebut" is also wrong on whether such statements are actually relevant to the case. Even if all such statements ever made by the declarant were made while she harbored a possibly improper motive, it still is a question of credibility for the trier of fact to determine whether she was and is a liar. Put differently, even if A.T. has always wanted to live with her mother rather than with her father, that does not mean she has not told the truth about her experience of sexual abuse by Petitioner. As the Advisory Committee noted, a prior statement may well be more likely to be true because it "was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation." Fed. R. Evid. 801(d)(1)(B) Adv. Comm. notes. And here, as the Court of Appeals observed and as

discussed in more detail in Part II, *infra*, other factors also indicate that, more likely than not, A.T.'s prior statements would be of some probative value in this case.

Petitioner's other textual argument is that the adjective "recent" should be read to modify not only the succeeding noun "fabrication," but also the independent additional clause, "improper influence or motive." Pet'r Br. 21-23. The improbable claim is thus that the drafters of the Rule meant to say, though they did not in fact manage to say, that prior consistent statements are admissible only when they are offered to rebut a charge of "recent fabrication or recent improper influence or recent improper motive." Quite aside from the resulting implausible stacking of adjectives, this distortion of the actual language is hardly a natural reading from any standpoint.

Even more important, this suggested interpretation of the Rule fails to do justice to the kinds of situations that must be confronted under the Rule on an everyday basis, as exemplified by the facts of this very case. Here Petitioner contended that A.T.'s prior statements were made under the "improper influence or motive" that the child wanted to live with her mother rather than with her father. But even if that alleged influence or motive were recognized and accepted as being present here, it may well have existed throughout the girl's life. There is no clear suggestion in the record just when this preference was supposed to have arisen, but it is worth noting that the divorce of her parents occurred almost two years before A.T. made the statements at issue in this case, and a shared custody arrangement had been in place ever since. Thus, it is questionable whether the supposed improper influence or motive was indeed of "recent" vintage in this case, which is crucial to Petitioner's erroneous reading of the Rule.

This same problem, however, is likely to arise in many such cases. The drafters of the Rule simply did not intend or provide for a party to be able to impeach a witness by alleging improper motive, without any obvious or recent genesis, and then

exclude all countervailing efforts to rehabilitate the witness by introducing prior consistent statements on the ground that those statements postdate the alleged motive. In such circumstances, Petitioner's argument about the importance of the term "recent" would become a cloak for excluding statements even where the alleged motive to lie, as in this case, was not necessarily of recent origin. Instead, such statements are to be admitted where they are offered to rebut a charge of "improper influence or motive," whether or not it is alleged to have arisen just recently, as long as the trial court properly determines that the factors surrounding the making of such statements indicates that they are likely to be relevant to the determinations which must be made by the trier of fact.

B. The Principles of the Common Law.

Petitioner's alternative argument is based upon principles that he contends were developed and accepted at the common law and were carried forward by the adoption in 1975 of the new Federal Rules of Evidence, specifically in Rule 801(d)(1)(B). Pet'r Br. 23-31. He correctly notes that several courts have chosen to import a "pre-motive" restriction into the Rule because they had taken this approach at the common law and they believed that the drafters of the Rule should be understood to have codified that approach. *See United States v. Quinto*, 582 F.2d 224, 232-34 (2d Cir. 1978); *United States v. Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984). Yet Petitioner's argument glosses over the lack of consensus on this issue at the common law, ignores dramatic changes that were made to prior case law in Rule 801(d)(1)(B), and fails to apply the broader schematic approach that this Court embraced in construing the Federal Rules of Evidence in *Bourjaily v. United States*, 483 U.S. 171 (1987).

Prior to the adoption of the Federal Rules of Evidence in 1975, the common-law position on the admissibility of prior consistent statements underwent substantial evolution. One of the

earliest positions to emerge was that a witness's statement made at trial could be corroborated by any and all prior consistent statements, without limitation, and the prior statements could be relied upon as substantive evidence in the case. E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. Rev. 231, 239. By the mid-nineteenth century, however, the general development of more elaborate hearsay rules came to be reflected in this particular doctrine as well. As a result, prior consistent statements were generally prohibited as substantive evidence, but continued to be admissible for the purpose of rehabilitating a witness whose credibility had been attacked. *Id.* In applying the common-law rule to allow the rehabilitation of such a witness, some courts -- though by no means all -- began to import a further requirement that for a prior consistent statement to be admissible in court to rehabilitate a witness, the statement must have preceded the occurrence of any circumstances that gave rise to an alleged motive to lie. *See, e.g., United States v. Corry*, 183 F.2d 155, 157 (2nd Cir. 1950); *Malone v. United States*, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938). *But see United States v. Gandy*, 469 F.2d 1134, 1134-35 (5th Cir. 1972) (prior consistent statements should be admitted without regard to their timing), *cert. denied*, 410 U.S. 986 (1973); *Hanger v. United States*, 398 F.2d 91, 104 (8th Cir. 1968) (same), *cert. denied*, 393 U.S. 1119 (1969). Yet the Uniform Rule that was devised over this same period, and which had some influence on the developing case law in the federal and state courts, would have simply allowed the admission and use as substantive evidence of "any out-of-court statement of a declarant who is present at the trial and available for cross-examination." *See* Fed. R. Evid. 801(d)(1)(B) Adv. Comm. notes (describing provisions of Uniform Rule 63(1)).

When the Federal Rules of Evidence were adopted in 1975, the treatment of prior consistent statements underwent further change. The most significant departure in Rule 801(d)(1)(B) from the more recent practice under the common law

was to enlarge the permissible use of prior consistent statements by permitting them once again to be introduced and relied upon as substantive evidence, and not simply used for the more narrow purpose of rehabilitating a witness. *See* Fed. R. Evid. 801(d)(1)(B) Adv. Comm. notes. The Advisory Committee notes do not directly address the "pre-motive" issue, but strongly suggest that a broad usage of prior consistent statements was intended under the new Rule, stating:

> (B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission into evidence, no sound reason is apparent why it should not be received generally.

Id. (emphasis added). This approach, which reflects a self-conscious departure from principles developed at the common law, casts considerable doubt on Petitioner's contention that restrictions imposed at the common law on the use of such statements -- even if there were consensus about any such restrictions, which there was not -- should be read into Rule 801(d)(1)(B) by mere implication.

The legislative history on the adoption of Rule 801(d)(1)(B) does not address with any clarity how the Rule should be applied in particular circumstances such as those raised in this case. *See* H.R. Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7098; S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7051; H.R. Rep. No. 650, 93d Cong., 1st Sess., *reprinted in* 1974 U.S.C.C.A.N. 7075. Perhaps the only relevant statement in the legislative committee reports, which actually is made about prior *in*consistent statements and echoes a comment made in the Advisory Committee notes, is that

"[t]he prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play." S. Rep. No. 1277, *supra*, 1974 U.S.C.C.A.N. at 7062. This observation, of course, would counsel in favor of a broad use of prior statements at trial.

Since the adoption of Rule 801(d)(1)(B), the federal courts have differed on the effect, if any, that their former views at the common law about the use of prior consistent statements should have in determining how the Rule should be interpreted and applied. *See United States v. Harris*, 761 F.2d 394, 399 (7th Cir. 1985) (court held, in explicit disregard of the language and explanation of the Rule, that a prior consistent statement that postdates an alleged motive to lie may be used to rehabilitate but not as substantive evidence); *Henderson*, 717 F.2d at 138 (prior consistent statement is admissible only if it was made prior to the time the alleged motive arose); *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. 1981) (adhering to its previous common-law view, which was that a prior consistent statement may be admissible regardless of whether the statement was made before the alleged motive arose).

As there continue to be different views among the federal courts both about what the proper common-law principles are on this issue and about what importance any such principles should continue to have in the face of the text of Rule 801(d)(1)(B), the amici States contend again that a proper interpretation of the Rule must be drawn from within "the language of the Rule itself," and not from the ragged inconsistencies of the common law. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). Many of the lower courts have properly so held. *See, e.g., United States v. Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992); *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989); *United States v. Pendas-Martinez*, 845 F.2d 938, 942 n.6 (11th Cir. 1988); *Parry*, 649 F.2d at 296.

On this score, this Court's analysis in *Bourjaily* presents the proper and controlling analysis here as well. In that case, several issues were raised concerning the admissibility of statements under Federal Rule of Evidence 801(d)(2)(E), which, like the Rule at issue in this case, presents specific exceptions to standard hearsay rules. An essential point in the case was that the text of the Federal Rules of Evidence appeared inconsistent with prior decisions rendered by this Court before the new Rules were enacted in 1975, including one decision rendered as recently as 1974. 483 U.S. at 176-79. This Court uncompromisingly declared that the new Rules "now govern the treatment of evidentiary questions in federal courts." *Id.* at 177. As in this case, the Court observed that many lower courts had interpreted the new Rules to retain a particular common-law principle "unscathed," and thus had held that the new Rule "does not mean what it says. We disagree." *Id.* at 178. In response to the further argument that Congress "evidenced no intent to disturb the [previous common-law] approach, and we should not find that Congress altered the rule without affirmative evidence so indicating," this Court was again unequivocal: "It would be extraordinary to require legislative history to confirm the plain meaning of [the Rule]." *Id.* (emphasis in original). The same schematic approach to interpreting the Federal Rules of Evidence applies foursquare in this case as well.

II. ANY OTHER CIRCUMSTANCES THAT MAY BE RAISED IN CONTESTING THE ADMISSIBILITY OF PRIOR CONSISTENT STATEMENTS WHICH ARE PROPERLY PROFFERED UNDER RULE 801(d)(1)(B) SHOULD BE JUDGED BY ASSESSING THEIR BEARING UPON RELEVANCY AND THE OTHER CONSIDERATIONS EXPRESSLY SET FORTH IN RULES 402 AND 403.

One of the primary reasons many lower courts have given for importing a "pre-motive" requirement into Rule 801(d)(1)(B) is the flat assertion that prior consistent statements are "of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same for the simple reason that more repetition does not imply veracity." *Harris*, 761 F.2d at 399. If all that these cases involved were merely dull repetition of the same statement in the identical circumstances, then this statement would have more force. As this case shows, however, and as the Court of Appeals properly observed below, there are many different factors that may bear on the probative value of prior consistent statements. As a result, a *per se* rule of inadmissibility is inappropriate. Instead, the relevancy and ultimately the admissibility of such statements should be judged by the trial court under the mechanisms provided in the Federal Rules of Evidence for making those determinations, which are Rules 402 and 403.[2]

The Court of Appeals correctly concluded here that the proper analysis of the admissibility of prior consistent statements

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[2] This Court confronted a similar issue in *Bourjaily*, where the adoption of Federal Rules of Evidence 104 and 1101, and their application to determinations of admissibility, were found to have a direct effect on the proper reading of Rule 801(d)(2)(E). *See* 483 U.S. at 177-79.

was laid down by the Ninth Circuit in *United States v. Miller*, 874 F.2d at 1272-74. There the court discussed the "pre-motive" requirement in detail, and finally declined to import such an "untenable limit on Rule 801(d)(1)(B)," concluding that any such rigid bar against prior consistent statements could not be justified if it were applied "without regard to other surrounding circumstances that may give them significant probative value." *Id.* at 1273-74 & n.12. On some occasions, the court noted, such statements amount to nothing more than mere repetition juxtaposed against a powerful motive to fabricate. But on other occasions, the motive to fabricate may be less powerful, and the circumstances surrounding the prior statements "may give them significant probative value." *Id.* at 1274.[3]

In the course of rejecting any "rigid *per se* [pre-motive] rule," *Miller*, 874 F.2d at 1274, the Ninth Circuit also examined the contrary holding of the Seventh Circuit in the *Harris* case. The court noted, ironically, that *Harris* had also recognized that the pre-motive requirement emerges from the relevancy concerns of Rules 402 and 403, rather than from anything that can be found within the language of Rule 801(d)(1)(B). Nonetheless, *Harris* had inexplicably and incorrectly read this requirement into Rule 801(d)(1)(B) itself. *See Miller*, 874 F.2d at 1272, citing *Harris*, 761 F.2d at 399 ("Thus, although a prior consistent statement may meet the literal requirements of Rule 801(d)(1)(B), it may nonetheless be inadmissible for failure to meet the relevancy requirement of Rule 402."). Instead of taking this same inexplicable leap, the *Miller* court declined to read this restriction into Rule 801(d)(1)(B) and instead concluded that the determination

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[3] In addition to the kinds of factors identified by the Advisory Committee, such as the fact that the prior statements were made closer in time to the events described and often will have been made outside of the pressures and incentives caused by an actual courtroom trial, other factors might include such matters as the context of the statement, the identity of any persons present, and the manner in which the statement was made.

of relevancy is properly left to the discretion of the trial judge under Rules 402 and 403. *See* 874 F.2d at 1274.

The amici States emphatically agree that these determinations are properly left to the discretion of the trial judge under Rule 402 (to determine relevancy) and Rule 403 (to balance probative value against prejudice and other countervailing factors). It is also proper, as observed both by the Court of Appeals here and by the Ninth Circuit in *Miller*, to regard the declarant's plausible motive to lie as only one factor that is not alone decisive of the issue, but instead is still an important or even a "crucial" factor in determining the admissibility of prior consistent statements. Pet. App. 17; *see also Miller*, 874 F.2d at 1274. The rejection of an unwarranted bar against such statements when they postdate an alleged motive to lie thus does not automatically guarantee that all such statements will be admitted at trial. Indeed, an illustrative application of this approach is the *Miller* case itself, where the Ninth Circuit found that some statements were properly excluded under this test and others were properly admitted. *See id.* at 1274-75. Thus, under Federal Rules of Evidence 402 and 403, if the prior statement has no relevancy to the issue at hand, or if it is relevant but its probative value is substantially outweighed by the danger of unfair prejudice, then the evidence would be ruled inadmissible.[4]

In applying Rules 402 and 403, the trial court should also take care to "examine the circumstances under which the statement

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[4] The amici States also agree with the Court of Appeals below and with the Ninth Circuit in *Miller* that "the standards for admission under Rule 801 (d)(1)(B) are the same whether the evidence is offered substantively or for rehabilitation," Pet. App. 17 n.8; *Miller*, 874 F.2d at 1273, which follows directly from the expansion in the use of such statements that was specifically approved by the drafters of Rule 801(d)(1)(B). The amici States would urge the Court to take the opportunity in this case to clear up any confusion that may continue to surround this issue.

was made." *United States v. Hamilton*, 689 F.2d 1262, 1273 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983). Thus, when there "are other indicia of reliability surrounding [the] prior consistent statement," or where the alleged motive to lie does not appear to be very strong, then again the mere fact that the statement postdated the existence of the alleged motive to lie should not be determinative of admissibility. *United States v. Lawson*, 872 F.2d 179, 183 (6th Cir.), *cert. denied*, 493 U.S. 834 (1989).

The courts below applied these principles correctly in this case. As the Court of Appeals stated, the alleged motive to lie here was not "a particularly strong one." Pet. App. 19. The child's out-of-court statements that she had been sexually abused by her father were themselves quite probative; one of the statements was spontaneous, others were made to three separate pediatricians, who stated that the child had informed them about the abuse, and no serious allegation was made that these statements were the product of any "coaching." *Id.* at 19-20 & n.9. The allegations also appeared to be corroborated by physical evidence about the child's hymenal tissue and vaginal opening. *Id.* at 5. Finally, the allegations made by the defense would require the conclusion that a five-year-old child could engage in and execute a prolonged and "calculated scheme to deceive," which was viewed as rather implausible here. *Id.* at 19-20.

For all of these reasons, therefore, the courts below properly ruled that A.T.'s prior consistent statements were admissible in this case under Rules 801(d)(1)(B), 402, and 403.

III. THIS COURT HAS RECOGNIZED AND ACCOMMODATED THE SUBSTANTIAL PUBLIC INTEREST IN ENSURING THAT THE TESTIMONY OF CHILDREN WHO ARE VICTIMS OF CRIME CAN BE ADMITTED IN PROSECUTIONS OF THOSE WHO PERPETRATE SUCH CRIMES, AND THE SAME SUBSTANTIAL PUBLIC INTEREST SHOULD BE RECOGNIZED AND APPLIED IN THIS CASE.

The amici States also urge the Court to find A.T.'s prior consistent statements admissible in this case because the importance of ensuring effective testimony by children who are victims of crime is a factor that is germane to the determination of relevancy and admissibility in these circumstances.

The importance of this interest was recognized by this Court in *Maryland v. Craig*, 497 U.S. 836 (1990). In Justice O'Connor's opinion for the Court, it was held that the Confrontation Clause does not categorically prohibit a child witness in a child abuse case from testifying against a defendant at trial by one-way closed circuit television. In so holding, the Court did not simply engage in an abstract analysis of the Confrontation Clause, but leavened that analysis by considering the importance of the countervailing state interest "in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator." *Id.* at 852. This interest in "the protection of minor victims of sex crimes" was judged to be a compelling one, *id.*, given the State's "traditional and transcendant interest in protecting the welfare of children," *id.* at 855, quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968). As the Court has summed up the matter: "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and

psychological well-being of a minor' is 'compelling.' " *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), quoting *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

In *Craig*, moreover, this Court recognized that such a compelling state interest bore weight even against claims that constitutional rights were being infringed. As the Court squarely acknowledged, "'we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.'" *Id.* at 852, quoting *Ferber*, 458 U.S. at 757. Of course, no such claims of constitutional violations are even raised in this case, and thus an even stronger argument can be made for the relative importance of this factor in assessing the proper balance to be struck in determining the admissibility of A.T.'s prior consistent statements here.[5]

Finally, the amici States would stress that the "pre-motive" restriction which Petitioner seeks to read into Rule 801(d)(1)(B) could have a devastating effect on efforts to prosecute charges of sexually abusing a child. As this Court recognized in *Craig*, the serious difficulties of obtaining testimony from victims of child abuse, and of sexual abuse in particular, in the traumatic setting of a courtroom trial should not be minimized. Especially in the case of young children, spontaneous or otherwise reliable statements made outside the courtroom often can provide useful and quite probative evidence as to the actual facts of the case.

In the context of such cases, the defense will always be able to devise some alleged motive for the child to lie. In cases of abuse, it may well be simply that the child would prefer not to have contact with the defendant, which would certainly be expected in such cases, or perhaps that the child is alleged to desire

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[5] Although Petitioner raised constitutional claims below under the Confrontation Clause and the Due Process Clause, see Pet. App. 20-22, 23-25, no such claims have been presented to this Court.

attention. *See, e.g., State v. Robinson,* 611 A.2d 852 (Vt. 1992). Such alleged motives to lie, which may be weak motives at best or may have little or no obvious or recent origin, could readily permit the defense to remove any possibility that prior consistent statements made by the child victim -- no matter how probative the circumstances in which they were made -- could be admitted at trial. Such a result would plainly disserve the substantial state interest, recognized in many decisions of this Court, in protecting the physical and psychological well-being of children. Instead, the discretion to make such decisions should be vested in the trial court, where it is expressly placed under Rules 402 and 403, so that judges can make a reasoned determination about the admissibility of such statements in the context of the interests that are directly raised in particular cases. The approach adopted by the Court of Appeals in this case represents a sensitive and sound weighing of those interests in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Respondent, this Court should affirm the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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